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No. 03-94

Supreme Court, U.S.
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In The

Supreme Court of the United States

KYLE P. CHRISTENBERRY, M.D. and
W. NEWTON GODFREE, M.D.,

Petitioners,

v.

KATHY ALLEN,

Respondent.

On Petition For A Writ Of Certiorari
To The Eleventh Circuit Court Of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did Christenberry and Godfree have a right to remove the state medical malpractice action to federal court after the Attorney General received notice of the action and, within 15 days of such notification, filed a response in the state action pursuant to 42 U.S.C. § 233(l)(1) stating that the Secretary of Health and Human Services was considering Christenberry's and Godfree's claims of federal employee status?

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STATEMENT OF THE CASE

Kathy Allen adopts the statement of the case provided in the Eleventh Circuit's opinion in *Allen v. Christenberry*, 327 F.3d 1290 (11th Cir. 2003) ("*Allen*"). Specifically, Kathy Allen disputes the assertion of Christenberry and Godfree that the Secretary of Health and Human Services (HHS) deemed Christenberry and Godfree to be federal employees. *See* Pet. at 3, 8. In June 1996, the Secretary of HHS deemed Etowah Quality of Life Health Services, Inc. (EQOL) a federally funded community health center within the ambit of the Federally Supported Health Centers Assistance Act. Such a deeming by the Secretary means that EQOL's officers, governing board members, employees, and contractors[1] are Public Health Service (PHS) employees for purposes of 42 U.S.C. § 233. The Secretary of HHS never specifically deemed Drs. Christenberry and Godfree as Public Health Service employees. However, on November 20, 2001, the Secretary of HHS specifically determined that neither Christenberry nor Godfree was a "contractor" of EQOL within the meaning of 42 U.S.C. § 233(g). Accordingly, the Secretary determined that neither person was a PHS employee under 42 U.S.C. § 233 for purposes of the medical malpractice action brought by Kathy Allen.

Christenberry and Godfree contend that the Attorney General was notified of Kathy Allen's lawsuit in July,

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[1] The term "contractor" as used in 42 U.S.C. § 233 includes only the following: a physician or other licensed or certified health care practitioner working full-time, i.e., minimum 32.5 hours per week, or part-time providing family practice, general internal medicine, general pediatrics, or obstetrical/gynecological services. 42 U.S.C. § 233(g).

1997. Pet. at 15-16. Based on that assertion, they contend that their removal of the case on November 21, 2001 was "more than 15 days after the Attorney General received notice of the lawsuit." Pet. at 11. Kathy Allen disputes the time when the Attorney General was first notified of Kathy Allen's lawsuit. The Attorney General in his state court appearance stated, and Kathy Allen agrees, that he was first notified of the lawsuit on November 16, 2001.

Kathy Allen disagrees with Christenberry's and Godfree's assertion that "the Eleventh Circuit did not reverse the Order in as far as it concluded (1) Christenberry and Godfree timely gave the only notice that they were required to give to their immediate superior, (2) Christenberry and Godfree were included as independent contractors covered by the contract with EQOL, and (3) Christenberry and Godfree were entitled to the protections afforded under 42 U.S.C. § 233(a)." Pet. at 10. By holding that the district court did not have removal jurisdiction, the Eleventh Circuit necessarily held void all holdings of the district court in this case for lack of jurisdiction. *Allen*, 327 F.3d at 1292, n. 1.

Kathy Allen also disputes Christenberry's and Godfree's assertion that Christenberry and Godfree contracted as individuals with EQOL rather than through their professional association.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW IS NOT IN CONFLICT WITH ANY DECISION IN OTHER FEDERAL CIRCUITS.

There have been no cases in any federal circuit court of appeals which have determined the propriety of removal by a party pursuant to 42 U.S.C. § 233. Therefore, there is no conflict between the interpretation of the removal provisions of 42 U.S.C. § 233 by the Eleventh Circuit in this case and interpretations of the removal provisions of 42 U.S.C. § 233 by any other federal circuit court of appeals.

Petitioners attempt to argue that a conflict exists within the Eleventh Circuit but they are only able to cite a footnote in *Green v. Hill*, 954 F.2d 694 (11th Cir. 1992), *withdrawn in part and amended on petition for reh'g*, 968 F.2d 1098 (11th Cir. 1992) ("*Green*") as one of the bases for the claimed conflict. Pet. at 11-12, 26. In *Green*, the Eleventh Circuit merely stated that 28 U.S.C. § 1446(b) does not apply to limit the time for removal by the Attorney General under 28 U.S.C. § 2679(d)(2). The Court in *Green* noted that 28 U.S.C. § 2679(d)(2) specifically provides that the Attorney General's time to remove is "any time before trial." Although 42 U.S.C. § 233(c), like 28 U.S.C. § 2679(d)(2), specifically states the time limit for the Attorney General to remove the case as "at any time before trial," no such statement is made in 42 U.S.C. § 233 about the time within which the case can be removed by a person claiming to be a PHS employee. The Eleventh Circuit held that if the Attorney General was notified in July or August of 1997 as argued by Christenberry and Godfree, then 28 U.S.C. § 1446(b) supplied the time limit (30 days) for removal by persons claiming to be PHS

employees. 42 U.S.C. § 233 does not address such a limitation. The Eleventh Circuit's holding in this regard is consistent with holdings in *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 129 (1995) and *Lazuka v. FDIC*, 931 F.2d 1530, 1536 (11th Cir. 1991) ("*Lazuka*") but is not inconsistent with any holding in other federal circuits.

Christenberry and Godfree also claim that the Eleventh Circuit's opinion in this case conflicts with its holding in *Flohr v. Mackovjak*, 84 F.3d 386 (11th Cir. 1996) ("*Flohr*"). In *Flohr*, the district court denied the United State's motion to substitute and remanded the case to state court. On appeal, the issue was whether the court of appeals had jurisdiction over the appeal. The court held that it had jurisdiction over the appeal of the district court's order denying the motion to substitute under the collateral order doctrine. *Flohr*, 84 F.3d at 390. *Flohr*, unlike this case, was about appellate jurisdiction, not removal jurisdiction.

The district court did, as claimed by Christenberry and Godfree, hold that Christenberry and Godfree were employees of PHS. However, that finding is void if the district court did not first have removal jurisdiction. Thus, Christenberry's and Godfree's assertion that the district court found them to be PHS employees is irrelevant. The inquiry at this stage is whether Christenberry and Godfree established that the district court had removal jurisdiction in the first place.

Christenberry and Godfree had the burden of establishing removal jurisdiction. *Diaz v. Sheppard*, 85 F.3d 1502, 1505 (11th Cir. 1996), *cert. denied*, 520 U.S. 1162 (1997). The Eleventh Circuit held that Christenberry and Godfree did not establish that the district court had

removal jurisdiction. *Allen*, 327 F.3d at 1291-1292. That holding rendered void the district court's finding that Christenberry and Godfree were PHS employees for purposes of the acts forming the basis of Kathy Allen's medical malpractice action.

II. THE DECISION BELOW IS NOT IN CONFLICT WITH GOVERNING SUPREME COURT PRECEDENT.

The U. S. Supreme Court has never interpreted 42 U.S.C. § 233. In fact, very little interpretation of 42 U.S.C. § 233 has occurred in any court. Christenberry and Godfree cite *Califano v. Sanders*, 430 U.S. 99, 105 (1977) as grounds that federal question jurisdiction existed and that they had a right to remove this medical malpractice action to federal court due to the Secretary's refusal to deem them as PHS employees, i.e., adverse agency action. However, *Califano* does not hold that removal from state court to federal court is proper when adverse agency action has some effect on the state action. The underlying state action in this case is a medical malpractice action brought pursuant to the laws of the State of Alabama; it is not a case arising from federal agency action or court review of federal agency action.

Christenberry and Godfree seem to rely on 28 U.S.C. § 1331 as a basis for removal jurisdiction. 28 U.S.C. § 1331 provides as follows:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1331 does not authorize removal of a state action to federal court. Instead, removal jurisdiction

founded on a federal question is conferred by 28 U.S.C. § 1441.[2] That section authorizes removal of "[a]ny civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States. . . . " 28 U.S.C. § 1441(b). Removal jurisdiction under 28 U.S.C. § 1441 is subject to the well-pleaded complaint rule. *Franchise Tax Bd. v. Laborers Vacation Trust*, 463 U.S. 1 (1983) ("*Franchise Tax Bd.*"). The well-pleaded complaint rule requires that "a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action." *Gully v. First National Bank in Meridian*, 299 U.S. 109, 112 (1936). "For better or worse . . . a defendant may not remove a case to federal court unless the plaintiff's complaint establishes that the case 'arises under' federal law." *Franchise Tax Bd.*, 463 U.S. at 10. Furthermore, a defendant cannot create removal jurisdiction under 28 U.S.C. § 1441 by raising a defense arising under federal law. *Id.* Therefore, Christenberry's and Godfree's claims of being PHS employees and thus immune from the state tort action do not confer removal jurisdiction under 28 U.S.C. § 1441.

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[2] Christenberry and Godfree failed to cite 28 U.S.C. § 1441 as a basis for their removal in this Court or in the courts below.

III. THIS CASE DOES NOT SQUARELY PRESENT AN IMPORTANT ISSUE OF FEDERAL LAW WITH SIGNIFICANT PRACTICAL CONSEQUENCES.

The dearth of case law interpreting provisions of 42 U.S.C. § 233 is a testament that this case does not present an important issue of federal law with significant practical consequences. In fact, it is unlikely that the circumstances in this case will ever arise again. In this case, Christenberry and Godfree made an initial attempt in July 1997 to be deemed PHS employees by the Secretary of HHS so that the Attorney General would certify them as acting in the scope of their employment for purposes of Kathy Allen's lawsuit. After having no success in that endeavor and having failed to notify either the Attorney General or the United States Attorney for the Northern District of Alabama about the lawsuit, Christenberry and Godfree then sat on their rights for the next four years until finally notifying the Attorney General on November 16, 2001. Five days later, the Attorney General appeared in state court pursuant to 42 U.S.C. § 233(l). Notwithstanding the appearance of the Attorney General, Christenberry and Godfree removed the case the next day to federal court, immediately before the case was to be tried in state court. Unlike Christenberry and Godfree, persons claiming to be PHS employees for acts underlying a medical malpractice action are unlikely to wait years before ensuring that the Secretary, Attorney General and United States attorney for the district involved are notified of the lawsuit pursuant to 42 U.S.C. § 233(b), especially if they read 42 U.S.C. § 233.

IV. THE DECISION BELOW WAS PROPERLY DECIDED.

The Eleventh Circuit held that the federal district court did not have removal jurisdiction under the specific facts of this case. *Allen*. In so holding, the Eleventh Circuit followed precisely the statutory language of 42 U.S.C. § 233(l) which permitted persons such as Christenberry and Godfree to remove the case only if the Attorney General failed to appear in state court within 15 days of being notified of the lawsuit. The district court determined that "it was not clear whether copies [of certain documents (not including the lawsuit)] were sent [in August 1997] to Einerson" of the Department of Justice. Pet. at 18, n. 11. Therefore, the district court had no evidence to establish that the Attorney General was notified of the lawsuit until November 16, 2001. In fact, the Attorney General stated in filed documents that he was first notified of the lawsuit on November 16, 2001. The Attorney General appeared in state court on November 20, 2001, being within 15 days of November 16, 2001 as required by 42 U.S.C. § 233(l)(1). On November 20, 2001, the Attorney General advised the state court that the Secretary of HHS had under consideration whether Christenberry and Godfree would be deemed PHS employees for purposes of the lawsuit. Therefore, Christenberry and Godfree had no right to remove the case on November 21, 2001 under 42 U.S.C. § 233(l)(2). The Eleventh Circuit in *Allen* succinctly made this point in its opinion. *Allen*, 327 F.3d at 1294-1295.

The district court did not find that the Attorney General received notice of the lawsuit in July or August of 1997. Christenberry and Godfree argued alternatively before the Eleventh Circuit that the Attorney General did receive notice of the lawsuit in July or August of 1997 or

that the Attorney General should have received notice in July or August of 1997. *Allen*, 327 F.3d at 1295. The Eleventh Circuit addressed their alternative argument in its opinion by holding that if the Attorney General was notified in 1997, then Christenberry's and Godfree's time to remove had expired by November 21, 2001 due to the application of the 30-day time limit set forth in 28 U.S.C. § 1446(b). *Id.* This holding is consistent with prior case holdings which have read 28 U.S.C. § 1446 *in pari materia* with other removal statutes having incomplete removal procedures. *See*, e.g., *Lazuka*, 931 F.2d 1530 (11th Cir. 1991).

V. CONSTITUTIONAL ARGUMENTS RAISED BY PETITION FOR WRIT OF CERTIORARI WERE NOT RAISED IN THE COURT BELOW OR IN THE NOTICE OF REMOVAL.

Christenberry and Godfree in their petition raise a due process argument under the Fifth and Fourteenth Amendments to the U. S. Constitution. Pet. at 2, 30. Christenberry and Godfree, however, did not cite any U. S. Constitutional provision in their brief to the Eleventh Circuit as grounds for establishing removal jurisdiction; nor did they cite such a provision in their Notice of Removal filed in the federal district court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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